Supreme Court, U.S.
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No. 97-651

In The

Supreme Court of the United States

October Term, 1997

HEATHER ANN SEWELL,

Petitioner,

v.

TOWN OF LAKE HAMILTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF

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REPLY BRIEF

Respondent's brief in opposition ironically underscores the need for this Court to grant the petition. The gist of the petition is that the Eleventh Circuit's opinion below cannot be reconciled with this Court's precedent, the Eleventh Circuit's own precedent in *Vineyard v. County of Murray*, 990 F.2d 1207 (11th Cir.), *cert. denied*, 126 L.Ed.2d 594, 114 S.Ct. 636 (1993), and the complex, confusing, and unsettled state of § 1983 jurisprudence. Rather than directly confronting these issues, Respondent tries to deflect the Court's attention by raising non-issues and ignoring the most significant aspects of the evidence and the law that govern this case. For example, Respondent makes no fewer than six references to the fact that Petitioner elected to sue the Town of Lake Hamilton for § 1983 liability, as opposed to suing some other party or suing Lake Hamilton under some other theory. One wonders what Respondent believes this adds to the Court's consideration of the petition. The petition makes clear that the issue in this case is whether the Town of Lake Hamilton is liable under § 1983 for Officer Stines's sexual harassment and assault of Heather Sewell. That was the issue presented at trial, on appeal, and in the petition. Respondent's repeated references to Petitioner's choice to sue under § 1983 are puzzling, unless viewed as an attempt to distract the Court from the obvious problems created by the opinion below.

Similarly, Respondent simply ignores – as the Eleventh Circuit did in its very brief opinion in this case – all of the evidence that established § 1983 liability. In so doing, Respondent ignores what both the jury and trial judge determined was the greater weight of the evidence.

In that regard, the majority of factual assertions in Respondent's Reply Brief were rejected by both the jury and the trial judge. Rather than acknowledging the overwhelming evidence in this case, Respondent characterizes that evidence as "out-of-context" and a "distortion of the legal significance of the record. . . . " (Opposition Brief at p. 4, 5) Indeed, Respondent's brief reads much like a closing argument on the facts – an argument soundly rejected at trial.

Respondent also completely overlooks – as did the Eleventh Circuit – the fact that this is more than a failure to train or supervise case. Petitioner presented substantial evidence regarding Respondent's total failure to have any system for dealing with citizen complaints about the lone officer on duty on the nighttime shift. Petitioner's expert witness testified:

> Q: Do you have an opinion concerning the adequacy of that custom?
>
> A: I think it's outrageous, particularly if you assign new officers to the midnight shift. They haven't been trained as to Department policies and procedures, there are no guidelines for those officers to follow. It's a time-bomb waiting to explode.
>
> * * *
>
> Q: Do you have, sir, an opinion concerning what [the relationship between Lake Hamilton and the borrowed nighttime dispatcher] should have entailed back in May of 91, how it should have been done?
>
> A: Well, absolutely. There should have been a mechanism there in which complaints of police

> misconduct, complaints of criminal activity by police officers should be immediately reported to the chief or one of the supervisors. That wasn't done. Instead what was done is, you had a lady who's complaining about being sexually assaulted [referring to Officer Stines's prior sexual assault on Sharon Washington]. If the suspect had been a civilian, they would have immediately dispatched a police officer to investigate that crime. In this case, it was worse. It was a police officer on duty acting under lawful authority, that committed or allegedly committed a sexual assault. And there was no immediate response. There was no call to the chief. Instead, it was called between business hours 8:00 to 5:00 Monday through Friday.

(R5:109; 52-53).

Lake Hamilton's flaws went far beyond failing to properly train and supervise police officers. Lake Hamilton failed to have even a minimum system of checks and balances in place to assure any control over or accountability for the lone nighttime officer's behavior. Being a police officer gives an individual absolute and total control over the citizens with whom he comes in contact. That type of power and authority fundamentally requires departmental discipline and a system that creates and imbues in each officer a sense of self-restraint. Describing one of the problems resulting from a lack of written policies, Petitioner's expert witness described a very different departmental atmosphere at Lake Hamilton:

> Q: What are the relevant advantages of having written policies over mere oral customs?

> A: Well, from written policies, the officers are working under a common base, a common knowledge. They are given – they are advised about what is appropriate behavior, what are appropriate procedures to use and they are prohibited from carrying out improper behavior and activities. So, there's consistency, there's an awareness of expectations, and it creates accountability, it creates responsibility. Where that doesn't exist, police officers are basically like the old west. They are given a gun and a badge and told to do justice.

(R5:109; 43). Respondent and the Eleventh Circuit in the opinion below wholly ignore this critical aspect of the case, as though the evidence did not even exist.

Unlike the Eleventh Circuit's opinion below, however, Respondent at least mentions the *Vineyard* case. However, while Respondent offers broad statements that *Vineyard* and the opinion below are consistent, Respondent fails to actually discuss the facts of *Vineyard*. This is not surprising – one cannot elaborate the facts in *Vineyard* and make a case that the opinion below is consistent with *Vineyard*. Instead, Respondent simply characterizes *Vineyard* as an "excessive force" case. The entire point of Respondent's argument is that some level of force is necessary as a part of police work and, therefore, excessive use of force can be a basis for liability on a failure to train or supervise theory:

> The difference [between *Vineyard* and this case] is that police officers have the authority by virtue of their municipal employment to use force. They do not have the authority to sexually assault suspects.

(Opposition Brief at p. 11) However, Respondent offers no suggestion as to what aspect of a police officer's municipal employment authorizes the vicious beating of an ill arrestee while handcuffed to a hospital bed. Characterizing *Vineyard* as an "excessive force" case is a disingenuous oversimplification and an unpersuasive attempt to ignore the irreconcilable conflict between *Vineyard* and the opinion below. Indeed, the fact that the same court can render such diametrically opposed opinions as *Vineyard* and the opinion on review highlights the need for this Court's intervention.

The theme of ignoring the governing facts and law is epitomized by Respondent's surprising reference to "the well-settled law of § 1983. . . . " (Opposition Brief at p. 18) One wonders what Respondent knows that the majority of federal courts in this country do not. Reviewing § 1983 decisions after *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), Justice Breyer characterized § 1983 law as a "highly complex body of interpretive law" and a "body of law that is neither readily understandable nor easy to apply." *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. ___, 137 L.Ed.2d 626 at 656, 117 S.Ct. ___ (1997).

Respondent asserts two other arguments that merit reply by Petitioner. First, Respondent characterizes Officer Stines's conduct as "so facially repugnant that a defect in human character" was the sole cause of the assault on Heather Sewell, thus exonerating Lake Hamilton from its failure to train and supervise Officer Stines and to provide the borrowed nighttime dispatcher with

any instructions regarding complaints about the only officer on duty. Respondent purports to take great umbrage at the notion that the Town of Lake Hamilton should have anticipated Officer Stines's conduct. That position – like most taken by Respondent – again ignores the actual evidence in the case, particularly the testimony of Chief Freeman and Petitioner's expert witness.

Respondent argues at p. 16:

> The incident that forms the basis of this case is simply so far removed from the worries town officials understandably should have for their police officers that, as a matter of law, the Town was not deliberately indifferent for not having anticipated it.

With great melodrama, Respondent's brief seems to express shock at the notion that a police department should anticipate that a rookie, untrained male officer with no supervision, alone in the middle of the night with an attractive woman who is completely at the officer's mercy, might succumb to sexual temptation. Respondent's argument is based on a naïve and unrealistic view of the world and human nature. Sexual harassment – particularly as the result of authority – happens everyday. It even happens in small towns.

More significantly, Respondent's rose colored view of society and human nature conflicts with Chief Freeman's candid admission that he did anticipate that Officer Stines would assault a female suspect and simply did nothing about it. Respondent labels Petitioner's claim that the Town of Lake Hamilton should have anticipated Officer Stines's conduct as "repugnant." Once again, Respondent's argument clashes with the evidence – Chief

Freeman's testimony proved that Lake Hamilton did in fact anticipate Officer Stines's conduct.

Finally, Respondent offers a lengthy discussion of the legislative history of § 1983. Respondent's historical review of the legislative debate and political struggle in the South during the Reconstruction is interesting, but adds little to this Court's analysis of the current state of § 1983 law that four justices of this Court have recognized needs repair.

One of the cornerstones of Respondent's legislative debate argument is that Congress's "rejection of the Sherman Amendment's imposition of liability on people in governments who have no direct involvement in the conspiracies" supports Respondent's view that this Court should not consider respondeat superior liability. Contrary to Respondent's characterization, as Justice Stevens pointed out in his dissent in *Oklahoma City v. Tuttle*, 471 U.S. 808, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985):

> [T]he debate on the Sherman Amendment – an amendment that would have imposed an extraordinary and novel form of absolute liability on municipalities – indicates that Congress seriously considered imposing *additional* responsibilities on municipalities without ever mentioning the possibility that they should have any *lesser* responsibility than any other person. The rejection of the Sherman Amendment sheds no light on the meaning of the statute, but the fact that such an extreme measure was even considered indicates that Congress thought it appropriate to require municipal corporations to share the responsibility for carrying out the

> commands of the Fourteenth Amendment. (emphasis original, footnote omitted)

471 U.S. at 839, 85 L.Ed.2d at 814.

Equally inaccurate is Respondent's assertion that "There is not one iota of support in the debate over H.R. 320 for the proposition that it was the governments *themselves* upon whom congress sought to impose liability." (Opposition Brief at p. 24). That bold and broad statement overlooks the language of the statute itself. As also explained by Justice Stevens in *Oklahoma City v. Tuttle*:

> As we have frequently noted, § 1983 "came on to the books as § 1 of the Ku Klux Act of April 20, 1871. 17 Stat 13." **The law was an especially important, remedial measure, drafted in expansive language. The class of potential defendants is broadly defined by the words "every person."** It is now settled that the word "person" encompasses municipal corporations, and, of course, it was true in 1871 as it is today that corporate entities can only act through their human agents. Thus, if Congress intended to impose liability on municipal corporations, it must have intended to make them responsible for at least some of the conduct of their agents. (emphasis added, footnotes omitted)

471 U.S. at 834-835, 85 L.Ed.2d at 811-812.

Respondent has not denied the importance of the question presented. Instead, Respondent asks this Court to ignore the evidence in this case, the obvious conflict between the opinion below and other authority, and, finally, the confounding and confusing state of § 1983 jurisprudence. This case presents an ideal opportunity for the Court to fix an area of the law that is badly broken. A

police officer abused his governmental authority and sexually assaulted an innocent woman, an assault that a judge and jury concluded was legally caused by Respondent's customs and policies. **Indeed, in response to special interrogatories in the verdict form, the jury concluded that Lake Hamilton's customs and policies were maintained with deliberate indifference to Heather Sewell's rights and that those customs and policies were the legal cause of her constitutional injury.** The trial judge concluded the jury's verdict was supported by the evidence. The Eleventh Circuit was able to reverse those conclusions only by writing an opinion that ignored the evidence and directly controlling authority.

Respectfully submitted,

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